LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
DEC 8 1970

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 103 ?

CASSIUS L. PEACOCK, JR.,
Petitioner,

vs.

RETAIL CREDIT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. JAMES JESSEE, JR.
SHOOB, MCLAIN & JESSEE
3242 First National Bank Tower
Atlanta, Georgia 30303
MARTIN DAVID MERRITT
SHOOB, MCLAIN & JESSEE
3242 First National Bank Tower
Atlanta, Georgia 30303
Attorneys for Petitioner

R. L. Hendershott, Inc., 609 Cherry Street, Kansas City, Mo. 64106, 421-2033

INDEX

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions, Statutes, and Rules Involved 4

Statement of the Case 5

Reasons for Granting Writ of Certiorari 9

Argument—

I. The Court of Appeals and the District Court Misapprehended the Georgia Law of Invasion of Privacy and Misapplied the *Erie* Doctrine and Erred in Holding That the Publication of False Defamatory Credit Reports Did Not Constitute an Invasion of Petitioner's Common Law and Constitutional Right of Privacy 11

II. The Court of Appeals and the District Court Misapprehended the Georgia Law Pertaining to Suspension of the Statute of Limitations by Active Concealment and Liability for Republication and Erred in Holding That Petitioner's Cause of Action for Libel Was Barred by the Statute of Limitations 15

III. The Court of Appeals and the District Court Erred in Completely Overlooking the Fact that, Irrespective of Petitioner's Right to Recover Money Damages, He Is Entitled to Equitable Relief in the Form of a Retraction of Said False Reports 22

IV. The Court of Appeals and the District Court Erred in Denying Discovery and Such Refusal to Permit Discovery Is in Direct Conflict with *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947), and Denies Petitioner His Right to Equal Protection under the Law

and Constitutes a Denial of Procedural Due Process under the Constitution of the State of Georgia of 1945 and the Constitution of the United States of America 28

V. The Court of Appeals and the District Court Erred in Holding That It Was Immaterial As to Where Publication of the Defamatory Reports Occurred and in Refusing to Apply the *Lex Loci Delicti* on Issues of Substantive Law in Direct Contravention of the Rule Laid Down in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 30

Conclusion 31

Certificate of Service 32

Appendix—

(1) Opinions, Judgments and Orders of the District Court and the Fifth Circuit Court of Appeals A1

(2) Order Extending Time to File Petition for Writ of Certiorari A18

(3) Constitutional Provisions A18

(4) Federal Statutes A19

(5) Federal Rules of Civil Procedure A20

(6) Bibliography of Materials Pertinent to Credit Reports and Invasion of Privacy A24

Table of Citations

Cases

Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930) 23

Bernstein v. Commercial National Bank, 161 La. 38, 108 So. 117 (1926) 18, 19

The Bradstreet Company v. Oswald, 96 Ga. 396, 23 S.E. 423 (1895) 16-17, 28

Brown v. McDonald, 133 F. 897 (3rd Cir. 1905) 29

Cabaniss v. Hipsley, 114 Ga. App. 367, 151 S.E.2d 496 (1966) 11, 12
Cheesman v. Tveto, 384 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1283 (1957) 28, 29
Coca-Cola Co. v. Atlanta, 152 Ga. 598, 110 S.E. 730 (1921) 29
Copley v. Northwestern Mutual Life Insurance Company and Retail Credit, 295 F. Supp. 62 (S.D. W.Va.) 14-15
Diplomat Electric, Inc. v. Westinghouse Electric Supply Co., 378 F.2d 377 (5th Cir. 1967) 31
Dixon v. Holden, 7 Eq. 488 (1869) 24
Dowd v. United States ex rel. Cook, 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215 (1951) 28, 29
Elnet v. Belgrave, In Chancery (1395) 23
Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 13, 30
Girsh v. Girsh, 222 F. Supp. 601 (E.D. Penn. 1963) 18

Cases

Griswold v. State of Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) 11
Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947) 4, 10, 25, 26, 27
Howe v. Bradstreet Company, 135 Ga. 864, 69 S.E. 1092 (1911) 16, 21
Johnson v. The Bradstreet Company, 77 Ga. 172 (1886) 16, 17, 28
Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 ..... 4, 10, 31
Kurtz v. Brown, 182 F. 372 (3rd Cir. 1910) 29
Lanier v. Coastal States Life Insurance Company, 106 Ga. App. 802, 128 S.E.2d 580 (1962) 16, 18, 19
Lucas v. Neisslinger, 210 Ga. 837, 81 S.E.2d 625 (1954) 29

Nader v. General Motors Corporation, 282 N.Y.S.2d 814, 818 (1968) 11
Orr v. Steinmetz, 230 F.2d 182 (8th Cir. 1956) 31
Parrish v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1904) 11, 13, 14, 24
Peterson v. Klos, ... F.2d ..... (8th Cir. 1970) 13, 15
Pressed Steel Car Co. v. Union Pacific Ry., 240 F. 135 (D.C. N.Y. 1917) 29
Priest v. Exposition Cotton Mills, 66 Ga. App. 301, 71 S.E.2d 743 (1952) 16, 18
Rahn v. United States, 222 F. Supp. 775 (S.D. Ga. 1963) 18, 19
Riley v. Dun & Bradstreet, 172 F.2d 303 (6 Cir. 1949) 16, 21
Rinzler v. Westinghouse Electric Corporation, 333 F.2d 719 (8th Cir. 1964) 18
Southern Railway Company v. Lanham, 403 F.2d 119 (5th Cir. 1968) 25, 27
Spevack v. United States, 380 F.2d 977, 981 (Ct. Cl. 1963) 18
Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 67 A. 97 (1907) 24
Walter Bledsoe & Co. v. Elkhorn Land Co., 219 F.2d 866 (6 Cir. 1955) 18
Weaver v. Beneficial Finance Co., 199 Va. 186, 98 S.E.2d 687 (1957) 16, 21
Webber v. Gray, 238 Ark. 280, 307 S.W.2d 80 (1957) 24
Western Union Telegraph Company v. Pritchett, 108 Ga. 411, 34 S.E. 216 (1899) 17, 28
Wood v. Anderson, 60 Ga. App. 282, 3 S.E.2d 768 (1939) 16, 18

STATUTES

Georgia Code §3-105 ..... 4, 5, 14
Georgia Code §3-807 ..... 4, 5, 16, 17, 18
Georgia Code §3-1004 ..... 4, 5

OTHER AUTHORITIES

Black's Law Dictionary, Fourth Edition, p. 405 29

Chaffee and Pound, *Cases on Equitable Relief Against Torts Including Defamation and Injuries to Personality* (1933) 23

Chaffee and Re, *Cases and Materials on Equity* (1957) 23-24

Constitution of the State of Georgia 4

Constitution of the State of Georgia of 1945, Article I, Section I, Paragraphs II and III 4, 26, 29

Constitution of the United States 4

Constitution of the United States, Fourth Amendment 4, 26, 29

Constitution of the United States, Fifth Amendment 4, 26, 29

Federal Rules of Civil Procedure 27

Federal Rules of Civil Procedure, Rule 26 ..... 3, 5, 26

Federal Rules of Civil Procedure, Rule 30 ..... 3, 5, 26

Federal Rules of Civil Procedure, Rule 33 ..... 3, 5, 26

Federal Rules of Civil Procedure, Rule 34 ..... 3, 26

Federal Rules of Civil Procedure, Rule 36 ..... 3, 5, 26

Federal Rules of Civil Procedure, Rule 45 ..... 3, 5, 26

Federal Rules of Civil Procedure, Rule 52(b) 5, 6

Federal Rules of Civil Procedure, Rule 56(e) 5

Federal Rules of Civil Procedure, Rule 56(f) 3, 5, 26

Federal Rules of Civil Procedure, Rule 59(a) 5, 6

Federal Rules of Civil Procedure, Rule 59(e) 5, 6

Pound, *Cases on Equitable Relief Against Defamation and Other Injuries by Writing or Speaking* (1915) 23

Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 Harvard Law Review 640 (1916) 23

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

CASSIUS L. PEACOCK, JR.,
Petitioner,

vs.

RETAIL CREDIT COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Cassius L. Peacock, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit made and entered in the above cause on July 2, 1970.

OPINIONS BELOW

The opinion and judgment rendered by the United States District Court on June 13, 1969 (Record pp. 176-192) is reported at 302 F. Supp. 418 (N.D. Ga. 1969). A copy of said opinion and judgment is appended to this petition in the Appendix at pp. A1-A12. The opinion and judgment ren-

dered by the United States Court of Appeals on July 2, 1970 (Record pp. 315-317), ____ F.2d ____ (5th Cir. 1970), has not yet been reported. A copy of said opinion and judgment is appended to this petition in the Appendix at pp. A13-A14.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit was dated and entered on July 2, 1970 (Record pp. 315-317; Appendix pp. A13-A14). The Court of Appeals denied the original Petition for Rehearing on August 3, 1970 (Record p. 350; Appendix p. A16). On October 5, 1970, a few days after learning that the Court of Appeals had inadvertently failed to consider the sealed *in camera* evidence, Petitioner filed a second petition for rehearing, which was designated as Appellant's Extraordinary Motion for Rehearing Out of Time (Record pp. 320-326). On October 29, 1970, while said motion for rehearing was still being considered by the Fifth Circuit Court of Appeals, Justice Hugo L. Black granted an extension of time in which to file a petition for writ of certiorari, to and including December 2, 1970 (Appendix p. A18). On November 3, 1970, the Fifth Circuit Court of Appeals denied Petitioner's motion for rehearing (Appendix p. A17).

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254 (Appendix p. A19). Said statutory provision confers on this Court the jurisdiction to review the judgment and opinion of the Fifth Circuit Court of Appeals by writ of certiorari.

QUESTIONS PRESENTED

The questions presented by this case arise from a suit by Cassius L. Peacock, Jr., a general contractor (Record p. 166), seeking both damages and equitable relief in connection with false defamatory credit reports published by Re-

tail Credit Company (Record pp. 1-8, 90-93, 173-175). Said credit reports contain, *inter alia*, the false, libelous and defamatory statements that: (1) Petitioner was making false financial reports in his capacity as an officer of Peacock Construction Company; (2) that Petitioner was an adulterer and had sex relations with three successive bookkeepers employed by Peacock Construction Company; and (3) that Petitioner was entertaining prostitutes in an Atlanta, Georgia motel on a regular basis for his own pleasure and that of his friends and business associates (Record pp. 2-3, 34-35, 91, 159-160, 166, 197). The District Court denied discovery under Rules 26, 30, 33, 34, 36, 45, and 56(f) of the *Federal Rules of Civil Procedure* and granted Retail Credit Company's motion for summary judgment, holding: (1) that the publication of false credit reports did not constitute an invasion of Petitioner's right to privacy; and (2) that Petitioner's cause of action for libel was barred by the statute of limitations, even though he brought suit within less than one year from the date he first learned of the existence of these false defamatory statements (Record pp. 160-162).

The questions presented are:

1. Whether the Court of Appeals and the District Court misapprehended the Georgia Law of Invasion of Privacy and misapplied the *Erie* Doctrine and erred in holding that the publication of false defamatory credit reports did not constitute an invasion of Petitioner's common law and constitutional right of privacy.

2. Whether the Court of Appeals and the District Court misapprehended the Georgia law pertaining to suspension of the statute of limitations by active concealment and liability for republication and erred in holding that Petitioner's cause of action for libel was barred by the statute of limitations.

3. Whether the Court of Appeals and the District Court erred in completely overlooking the fact that, irrespective of Petitioner's right to recover money damages, he is entitled to equitable relief in the form of a retraction or correction of the false defamatory credit reports and an injunction against further publication and republication of said false reports.

4. Whether the Court of Appeals and the District Court erred in denying discovery and whether such refusal to permit discovery is in direct conflict with *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947), and denies Petitioner his right to equal protection under the law and constitutes a denial of procedural due process under the Constitution of the State of Georgia of 1945 and the Constitution of the United States of America.

5. Whether the Court of Appeals and the District Court erred in holding that it was immaterial as to where publication of the defamatory reports occurred and in refusing to apply the *lex loci delicti* on issues of substantive law in direct contravention of the rule laid down in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions which are involved in this case are the Fourth and Fifth Amendments of the Constitution of the United States and Article I, Section I, Paragraphs II and III of the Constitution of the State of Georgia of 1945. Said constitutional provisions are set forth in the Appendix at pp. A18-A19. The Georgia statutes relevant to decision in this case are *Georgia Code* §§ 3-105, 3-807, and 3-1004, which provide:

"3-105. *Remedy provided for every right.*—For every right there shall be a remedy, and every court having jurisdiction of the one, if necessary, may frame the other."

"3-807. *Fraud.*—If the defendant, or those under whom he claims, shall have been guilty of a fraud by which the plaintiff shall have been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud."

"3-1004. *Injuries to the person.*—Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year."

The Federal statutes and rules involved in this case are 28 U.S.C.A. § 1332, and Rules 26, 30, 33, 36, 45, 52(b), 56(e), 56(f), 59(a), and 59(e) of the *Federal Rules of Civil Procedure*. Said statute and rules are set forth in the Appendix at pp. A19-A24.

STATEMENT OF THE CASE

On September 12, 1967, the Petitioner, CASSIUS L. PEACOCK, JR., first learned that the defendant, RETAIL CREDIT COMPANY, had published reports containing false, libelous, and defamatory statements concerning him and had furnished same to insurance companies, surety companies, banks and financial institutions with which Petitioner and his firm, Peacock Construction Company, did business (Record pp. 2-3, 160, 166-167). The said reports contain, among other things, the following false, libelous and defamatory statements: (1) That Petitioner was making false financial reports in his capacity as an officer of Peacock Construction Company; (2) That Petitioner was an adulterer and had had sexual relations with three successive bookkeepers employed by Peacock Construction Company; and (3) that Petitioner was entertain-

ing prostitutes on a regular basis in an Atlanta, Georgia motel for his own pleasure and that of his friends and business associates (Record pp. 4-5, 34-35, 91, 160, 166, 173).

Petitioner has not falsified financial reports, has not been an adulterer, and has not engaged the services of prostitutes (Record pp. 168, 173). He is in the general contracting business and does business with numerous insurance companies, surety bonding companies, banks, financial institutions, and other corporations (Record p. 166). Petitioner's good name, reputation and credit standing, both personal and business, have been and will continue to be injured and damaged as a result of the false defamatory statements contained in said reports (Record pp. 3-4, 6, 166-168). The publication and distribution of the false and libelous "Retail Credit Reports", the preservation of such false reports in permanent files maintained by Retail Credit and its customers, and the anticipated use of these reports in the future, have caused and will continue to cause Petitioner extreme mental suffering, shame, humiliation, loss of sleep, and anxiety (Record pp. 168, 174).

Prior to September 12, 1967, Petitioner had no knowledge that Retail Credit Company had published reports containing said false, libelous, and defamatory statements (Record pp. 160-162). The existence of these reports, the contents of these reports, and the identity of the companies to whom such reports were made were *facts actively concealed from Petitioner by contractual arrangements that Retail Credit Company had with the companies to whom it reported* (Record pp. 4-5, 35-36, 162, 174).

The defendant has refused to voluntarily disclose the contents of its reports and the identity of the customers to whom said reports were furnished (Record pp. 35-36, 169). The defendant has also tried to block all efforts at dis-

covery by objecting to Petitioner's interrogatories, by objecting to Petitioner's requests for admissions, by objecting to Petitioner's motion for production of documents and by filing a motion to quash subpoenas duces tecum served upon the officers and employees of Retail Credit Company, Travelers Insurance Company, Travelers Indemnity Company, U. S. F. & G. Insurance Company, Fidelity Deposit & Indemnity Company of Baltimore, Maryland, and Commercial Union Insurance Company of New York (Record pp. 25-27, 28-31, 122-124). The said insurance and surety companies also filed motions to quash the subpoenas duces tecum served on their employees (Record pp. 124-129, 130-132, 149-156).

The defendant's obstructionist attitude throughout this case is also demonstrated by the testimony of its president, W. Lee Burge, at page 89 of his deposition:

> "Q. Will Retail Credit at this time allow Mr. Peacock to look at its file?
>
> A. No, sir.
>
> Q. Will Retail Credit allow Mr. Peacock to have copies of reports made on him?
>
> A. No, sir." (Record p. 307)

The reports containing the false defamatory statements concerning Petitioner are being maintained in the active files of Retail Credit Company and its customers and are being continually republished (Record pp. 4-6, 91-92, 167-168, 174).

After being advised of the falsity of the defamatory statements contained in said reports, the defendant has refused to retract or correct same (Record pp. 92, 169).

Petitioner filed a complaint in the United States District Court for the Northern District of Georgia, Atlanta Division on February 27, 1968 (Record pp. 1-8). The

basis for federal jurisdiction was provided by 28 U.S.C.A. § 1332 which gives the District Court jurisdiction of cases involving diversity of citizenship and a claim in excess of $10,000.00 (Appendix p. A19). Petitioner's complaint was amended on August 22, 1968 (Record pp. 90-94) and again on February 3, 1969 (Record pp. 173-175).

Petitioner sought discovery through use of requests for admissions (Record pp. 8-9), interrogatories (Record pp. 9-17), motion for production of documents (Record pp. 18-21), discovery in equity in the nature of a bill of discovery (Record pp. 92-93), notices of taking depositions (Record pp. 94-95, 98, 98-99) and subpoenas duces tecum (Record pp. 100-105, 106-121, 133-148).

On June 13, 1969, the Court entered an order and judgment in which it denied the Petitioner the right to discovery under his pending interrogatories, requests for admissions, motion for production of documents, notices of taking depositions, and subpoenas duces tecum; held that the Petitioner was not entitled to review the evidence submitted *in camera*; sustained the motions to quash subpoenas duces tecum; and granted Respondent's motion for summary judgment (Record pp. 176-192). Thereafter, on June 23, 1969, Petitioner filed his Motion for Rehearing and New Trial under Rule 59(a) and Motion for Amendment under Rule 52(b) and Rule 59(e) (Record pp. 193-196) and supporting affidavit (Record pp. 196-199). On August 18, 1969, the Court entered its Order Denying Plaintiff's Motion for New Trial or to Alter or Amend Judgment (Record pp. 199-201).

On September 16, 1969, Petitioner filed a memorandum for the record accompanied by an affidavit and exhibits and the District Judge filed the *in camera* evidence with

the Clerk of Court in a sealed envelope.' Thereafter, on the same day, Petitioner filed his Notice of Appeal (Record pp. 200-201).

The decision of the Court of Appeals was rendered on July 2, 1970 (Appendix pp. A13-A14). The Petition for Rehearing was denied on August 3, 1970 (Appendix p. A16). On October 5, 1970, Petitioner learned that the Court of Appeals had not considered the in camera evidence and filed a second petition for rehearing, which was designated as Appellant's Extraordinary Motion for Rehearing Out of Time (Record pp. 320-326). On October 29, 1970, while said motion for rehearing was still being considered by the Fifth Circuit Court of Appeals, Justice Hugo L. Black granted an extension of time in which to file a petition for a writ of certiorari to and through December 2, 1970 (Appendix p. A18). On November 3, 1970, the Fifth Circuit Court of Appeals denied Petitioner's motion for rehearing (Appendix p. A17).

REASONS FOR GRANTING WRIT OF CERTIORARI

There are compelling reasons why this Court should grant a writ of certiorari to review the opinion and judgment rendered by the Court of Appeals on July 2, 1970 (Appendix pp. A13-A14), affirming the opinion and judgment of the District Court entered on June 13, 1969 (Appendix pp. A1-A12). First and foremost, this case involves an important question of federal law which has not been, but should be, settled by this Court—i.e., whether publication of false derogatory "credit reports" constitutes an invasion of the right to privacy guaranteed by the Constitution

1. The in camera evidence was transmitted to the Fifth Circuit Court of Appeals in a sealed envelope without Petitioner's counsel being able to examine same. Counsel for Petitioner have still been unable to examine said in camera evidence and have requested that it be forwarded to this Court as part of the Record to be reviewed by members of this Court

of the United States. This is a matter of grave importance to millions of American citizens who run the risk of false derogatory credit reports being published, stored in the memory banks of computers, and remaining as perpetual blemishes against the good name and character of innocent victims.

Secondly, the Court of Appeals has decided important issues of State law in a way that conflicts with the applicable State law pertaining to invasion of privacy, libel, and suspension of statutes of limitations. The Court of Appeals completely misapprehended the Georgia law on said subjects and, in so doing, misapplied the *Erie* Doctrine. Next, the Court of Appeals' affirmance of the denial of discovery is in conflict with the decision of this Court in *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947) and is the antithesis of the avowed purpose of liberality in discovery enunciated in *Hickman* v. *Taylor*, and in many Court of Appeals decisions.

Fourth, the failure of the Courts below to grant equitable relief is totally inconsistent with numerous State and Federal decisions allowing equitable relief in cases involving defamation and invasion of privacy. Finally, the Court of Appeals' holding concerning application of the *lex loci delicti* is in direct conflict with other decisions of Courts of Appeals and the Supreme Court, including the decision in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 85 L.Ed. 1477, 61 S.Ct. 1020.

The reasons relied upon for the allowance of the writ of certiorari are amplified upon in the Argument which follows immediately hereafter.

ARGUMENT

I.

The Court of Appeals and the District Court Misapprehended the Georgia Law of Invasion of Privacy and Misapplied the Erie Doctrine and Erred in Holding That the Publication of False Defamatory Credit Reports Did Not Constitute an Invasion of Petitioner's Common Law and Constitutional Right of Privacy.

The right to privacy is a right guaranteed by the common law of Georgia. *Pavesich* v. *New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1904); and *Cabaniss* v. *Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496 (1966). It is also a right guaranteed by the Constitution of the United States of America and the Constitution of the State of Georgia of 1945. *Griswold* v. *State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); and *Nader* v. *General Motors Corporation*, 292 N.Y.S.2d 514, 518 (1968). In the latter case, the Court stated, at page 518:

> ". . . there is presented a constitutional right of plaintiff to privacy—a right to be left alone. The right of privacy stands on high ground, cognate to the values and concerns protected by constitutional guarantees (See: 4th, 5th and 14th Amendments, Fed. Constit.; *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453; *Griswold* v. *State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510; *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; *Afro-American Publishing Co.* v. *Jaffe*, 125 U.S. App. D.C. 70, 366 F.2d 649)."

The false and libelous reports published by Retail Credit Company have invaded Petitioner's right to privacy by placing him in a false light in the public eye, in that he has been falsely portrayed by said reports as a falsifier of financial reports, an adulterer, and a person who regularly

engages the services of prostitutes (Record pp. 165-169, 173-175). *Cabaniss* v. *Hipsley*, 114 Ga. App. 367, 151 S.E.2d 496 (1966). Petitioner has not falsified financial reports, has not been an adulterer, and has not engaged the services of prostitutes (Record pp. 168-169, 173). But even if said allegations were true, which Petitioner emphatically denies, the inclusion of such derogatory information in a "credit report" constitutes invasion of Petitioner's right to privacy as (1) an unwarranted intrusion into Petitioner's solitude and private affairs; and (2) unwarranted public disclosure of embarrassing private facts about Petitioner (Record pp. 166-169, 173-175). *Cabaniss* v. *Hipsley*, *supra*.

Under Georgia law, Petitioner is entitled to recover for both (1) damage caused to his reputation by the libels of the defendant and (2) mental suffering, shame, humiliation, loss of sleep, and anxiety caused by the invasions of his common law and constitutional rights to privacy.

In his deposition, W. Lee Burge, President of Retail Credit Company, admitted that investigations by Retail Credit invade the privacy of individuals and attempted to justify same by calling it a "proper invasion to the degree that seems to be pertinent" (Record pp. 263-264). However, Retail Credit's view of what appears to be a "proper" invasion of privacy appears to be at considerable variance with the view of Congress and members of the public at large. The concern over activities of the type the defendant engages in has become so great that Congress has established a Special Subcommittee on Invasion of Privacy On March 18, 1968, Mr. Burge testified before this Congressional Subcommittee (Record pp. 36-37, 46-58).

In his testimony, Mr. Burge stated: that Retail Credit will not reveal whether a report has been made, the contents thereof, or to whom such reports have been made (Record, pp. 36, 46-52); that errors are made by Retail

Credit (Record pp. 36, 57); that the Federal Bureau of Investigation and Internal Revenue Service have ready access to the files (Record pp. 36, 53-54); and that the reason for not disclosing that a report has been made is that it may invite legal action (Record pp. 36, 55-56).

The Court of Appeals and the District Court both misapprehended the Georgia law of invasion of privacy and misapplied the *Erie* doctrine. Analysis of the opinion of the District Court (Appendix pp. A1-A12; reported as 302 F. Supp. 418) reveals that the approach taken by the District Judge was to see if there had been any prior Georgia case involving false credit reports and, in the absence of a case on "all fours", to hold: (1) that there must be a physical intrusion into plaintiff's solitude; (2) that there was no "public" disclosure of embarrassing facts; and (3) that plaintiff had not been placed in a false light in the "public" eye. The affirmance of such an approach by the Fifth Circuit Court of Appeals (Appendix pp. A13-A14) is clearly not in accord with *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) or with *Peterson* v. *Klos*, ... F.2d ..... [Case No. 27,427] (5th Cir. 1970). Nor is it in accord with *Georgia Code* §3-105 and *Pavesich* v. *New England Life Insurance Company*, 122 Ga. 190, 50 S.E. 68 (1904).

Under the *Erie* doctrine, as stated in Footnote 16 of *Peterson* v. *Klos*, *supra*, it was the duty of the District Court, in the absence of an "all fours" precedent, to ". . . ascertain the policy inclination of the state's highest tribunal with regard to the matter in controversy. Failing that, the Court may assume that the state courts would adopt the rule which, in its view, is supported by the thrust of logic and authority."

The *Pavesich* case is the landmark decision on invasion of privacy in the United States. Strangely, however, this landmark decision of the highest State Court is given only

passing mention in the opinion of the District Court (Appendix pp. A1-A12; reported as 302 F. Supp. 418). Had the Court tarried a bit longer, it surely must have been struck by the following significant language:

> "1. The absence, for a long period of time, of a precedent for an asserted right is not conclusive evidence that the right does not exist. Where the case is new in principle, the courts can not give a remedy; *but where the case is new only in instance, it is the duty of the courts to give relief by the application of recognized principles.*" (Emphasis supplied.)

In *Pavesich, supra*, at page 199, the Court relied upon *Civil Code* § 4929, which has now been recodified as *Georgia Code* § 3-105, but still contains the identical language, as follows:

> "§ 3-105. *Remedy provided for every right.*—For every right there shall be a remedy, and every court having jurisdiction of the one, if necessary, may frame the other."

In *Pavesich*, the Supreme Court of Georgia stated that personal liberty includes the right "to be let alone" and that the right of privacy is derived from natural law and "its existence can be inferred from expressions used by commentators and writers on the law as well as by judges in decided cases." In this connection, it is interesting to note the vast majority of the newspaper and magazine writers, Congressmen, and others who have considered the matter, are of the opinion that false credit reports constitute an invasion of privacy. A bibliography of Congressional reports, records of hearings, newspaper and magazine articles, and other materials in this area is included in the Appendix to this Petition for a Writ of Certiorari (Appendix pp. A24-A28).

See also, *Copley* v. *Northwestern Mutual Life Insurance Company and Retail Credit Company*, 295 F. Supp.

93 (S.D. W.Va.). In the *Copley* case, the Court held that portions of credit reports pertaining to personal, rather than business matters stated a cause of action for invasion of privacy.

Petitioner shows that the Court of Appeals and District Court both erred in holding that defendant's dissemination of false defamatory reports did not constitute an invasion of plaintiff's right to privacy under the common law of Georgia and the Constitutions of the United States and the State of Georgia. Petitioner respectfully submits that, as shown by the authorities cited in the Bibliography of Materials Pertaining to Credit Reports and Invasion of Privacy (Appendix pp. A24-A28), the vast weight of public opinion is against the position taken by the Court of Appeals and the District Court in the present case. It is further respectfully submitted that the Courts below overlooked the significance of the *Pavesich* case, and misapplied the *Erie* doctrine as recently stated in *Peterson* v. *Klos*, ... F.2d ..... [Case No. 27,427] (5th Cir. 1970).

II

The Court of Appeals and the District Court Misapprehended the Georgia Law Pertaining to Suspension of the Statute of Limitations by Active Concealment and Liability for Republication and Erred in Holding That Petitioner's Cause of Action for Libel Was Barred by the Statute of Limitations.

Petitioner respectfully submits that the Court of Appeals and the District Court both misapprehended the Georgia law pertaining to suspension of the statute of limitations and, under the *Erie* doctrine, should have held that the affirmative conduct on the part of Retail Credit and its customers in concealing the existence of derogatory credit reports (Record pp. 4-5, 35-36, 64, 71, 162, 174) amounted to fraudulent concealment that suspended or

tolled the statute of limitations until plaintiff's discovery of such conduct in September, 1967. See, *Georgia Code* § 3-807; *Wood* v. *Anderson*, 60 Ga. App. 262, 3 S.E.2d 788 (1939); *Priest* v. *Exposition Cotton Mills*, 86 Ga. App. 301, 71 S.E.2d 743 (1952); and *Lanier* v. *Coastal States Life Insurance Company*, 106 Ga. App. 802, 128 S.E.2d 550 (1962).

Petitioner also respectfully submits that the Court misapprehended and misconstrued the case of *Howe* v. *Bradstreet Company*, 135 Ga. 564, 69 S.E. 1082 (1911), and, under the *Erie* doctrine, should have held that Retail Credit Company was liable for republications. Said case should have been construed as being in accord with *Riley* v. *Dun & Bradstreet*, 172 F.2d 303 (6th Cir. 1949); and *Weaver* v. *Beneficial Finance Co.*, 199 Va. 196, 98 S.E.2d 687 (1967).

The pleadings and affidavits in this case establish that the defendant Retail Credit published reports containing false and libelous statements about Petitioner which included, *inter alia*, the false defamatory statements that: (1) petitioner was making false financial reports in his capacity as an officer of Peacock Construction Company; (2) that Petitioner was an adulterer and had sexual relations with three successive bookkeepers employed by Peacock Construction Company; and (3) that Petitioner was entertaining prostitutes in an Atlanta, Georgia motel on a regular basis for his own pleasure and that of his friends and business associates (Record pp. 2-3, 34-35, 91, 159-160, 166, 197).

The false, libelous and defamatory statements contained in the reports published by the defendant are clearly actionable as libel *per se* under Georgia law. *Johnson* v. *The Bradstreet Company*, 77 Ga. 172 (1886); *The Bradstreet Company* v. *Oswald*, 96 Ga. 396, 23 S.E.

423 (1895); and *Western Union Telegraph Company* v. *Pritchett*, 108 Ga. 411, 34 S.E. 216 (1899).

In its answer, the defendant raised the defense that its reports are privileged (Record pp. 23-24). However, such contention is clearly not in accord with Georgia law. In *Johnson* v. *The Bradstreet Company*, *supra*, the Court rejected this contention, stating at p. 172:

> "The contract to pry into and give information concerning the business of another does not create such a private or public duty, legal or moral, as would make a false communication injurious to another, privileged."

For other language to the same effect, see *Western Union Telegraph Company*, *supra*, at page 415; and *Bradstreet Company* v. *Oswald*, *supra*, at page 401.

Petitioner shows that Retail Credit Company is liable on the original publication of the libelous and defamatory statements as made to its customers, even if such publication occurred more than one year prior to the filing of Petitioner's complaint, on the ground that the statute of limitations was tolled by the willful and fraudulent concealment of the publication from the Petitioner by a conspiracy of silence between the Retail Credit Company and its customers. As provided in the *Georgia Code*:

> "If the defendant, or those under whom he claims, shall have been guilty of a fraud by which the plaintiff shall have been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud." *Georgia Code* § 3-807.

The evidence is undisputed that Retail Credit Company entered into contractual arrangements with its customers to conceal the existence of any reports and the contents thereof (Record pp. 4-5, 35-36, 64, 71, 162, 174). Such affirmative conduct on the part of Retail Credit and its customers amounted to fraudulent concealment that sus-

pended or tolled the statute of limitations until plaintiff's discovery of such conduct in September, 1967. *Georgia Code*, § 3-807; *Wood* v. *Anderson*, 60 Ga. App. 262, 3 S.E.2d 788 (1939); *Priest* v. *Exposition Cotton Mills*, 86 Ga. App. 301, 71 S.E.2d 743 (1952); *Lanier* v. *Coastal States Life Insurance Company*, 106 Ga. App. 802, 128 S.E.2d 550 (1962); *Bernstein* v. *Commercial National Bank*, 161 La. 38, 108 So. 117 (1926); *Rahn* v. *United States*, 222 F. Supp. 775 (S.D. Ga. 1963); *Rinzler* v. *Westinghouse Electric Corporation*, 333 F.2d 719 (5th Cir. 1964); *Walter Bledsoe & Co.* v. *Elkhorn Land Co.*, 219 F.2d 556 (6th Cir. 1955); *Girsh* v. *Girsh*, 222 F. Supp. 901 (E.D. Penn. 1963); and *Spernack* v. *United States*, 390 F.2d 977, 981 (Ct. Cl. 1968).

In *Wood* v. *Anderson*, 60 Ga. App. 262, the Court held that concealment will toll the statute of limitations, stating:

> "1. A cause of action for personal injuries is not necessarily barred after the expiration of two years from the date of the commission of the injury. It is possible that, by reason of fraud or concealment by the person committing the injury the injured person's cause of action is deterred until such person discovers the fraud."

In *Priest* v. *Exposition Cotton Mills*, *supra*, the Georgia Court of Appeals stated, at page 305:

> "Mere ignorance of facts constituting a cause of action does not prevent the running of a statute of limitations. . . . But where such facts are fraudulently concealed by the other party, as where some trick or artifice has been employed to prevent inquiry or elude investigation, or to mislead and hinder a party who has a cause of action from obtaining information, and where there is more than a mere failure to disclose, or else where there is a duty to make a disclosure, the bar of the statute will be relieved."

In *Lanier v. Coastal States Life Insurance Company, supra*, the Court held that, by its conduct, the defendant was estopped from asserting a plea of the statute of limitations.

The case of *Bernstein v. Commercial National Bank, supra*, involved libel in a letter, the existence of which was concealed from the plaintiff. In holding that the statute of limitations was tolled, the Supreme Court of Louisiana stated:

> "In our view, the communication is libelous, and the plaintiff is entitled to judgment for the libel, unless his demand for damages is barred by the prescription of one year, which defendants have pleaded . . ."
>
> • • •
>
> "In our opinion, prescription was suspended by the fraud and deception practiced on plaintiff in delivering the letter. The purpose of this deception was to conceal from him that such a letter had been written and delivered, and its effect was to conceal from him his cause of action . . . Under these circumstances we think the course of prescription was suspended until the fraud was discovered."

In *Rahn v. United States, supra*, the United States District Court for the Southern District of Georgia stated:

> "The Court further finds, as a matter of law, that the Statute of Limitations does not commence to run until an injured party, such as the plaintiff, obtained knowledge of the wrongful actions committed against her and which had been concealed to a time which was within two years of the date suit was filed. The Statute of Limitations is tolled where a physician has concealed the facts showing negligence, and the Statute of Limitations begins to run only when the facts are discovered. . . ."
>
> • • •

"A concealment of a cause of action from one in whom it resides, by one against whom it lies constitutes an exception to the Statute of Limitations, postponing the commencement of the running of the Statute until discovery of the fact by the owner of the cause of action, and under this rule one who wrongfully conceals material facts and thereby prevents discovery of his wrong or the fact that the cause of action was accrued against him is not permitted to assert the Statute of Limitations as a bar to an action against him, thus taking advantage of his own wrong. See: *Traer* v. *Clews*, 115 U.S. 528, 6 S.Ct. 155, 29 L.Ed. 467, 469.

"Stated in another way, the rule is that where a party against whom a cause of action has accrued in favor of another, but concealment prevents other party from obtaining knowledge thereof, the Statute of Limitations would begin to run from the time the right of action is discovered. See: *Rosenthal* v. *Walker*, 111 U.S. 185, 4 S.Ct. 382, 28 L.Ed. 395."

In view of the authorities cited above, Petitioner submits that the courts below erred in holding that Petitioner's action for libel was barred by the statute of limitations set out in *Georgia Code Annotated*, § 3-1004, and should have held that the active concealment on the part of Retail Credit Company and its customers suspended or tolled the statute of limitations.

The reports containing the false, libelous and defamatory statements have been placed in the active files of Retail Credit and its customers and have been periodically used and republished (Record pp. 4-6, 91-92, 167-168, 174). In his deposition of September 11, 1968, W. Lee Burge, President of Retail Credit, admitted that defendant maintained reference files of derogatory information for ten years, which files are reviewed by Retail Credit employees in making new reports (pages 40, 47 and 84 of

the Burge deposition—Record pp. 254-255, 262-263, 302-303); that its reports are retained in files of insurance and surety companies, being reviewed by one or more employees (pages 64-67) of the Burge deposition—Record pp. 280-284); and that the insurance companies and bonding companies sometimes passed this information on to insurance agents and brokers (pages 56, 87-88 of the Burge deposition—Record pp. 271-272, 305-306). On May 18, 1968, Mr. Burge, in his testimony before the Congressional Special Subcommittee on Invasion of Privacy, also testified that the Federal Bureau of Investigation and Internal Revenue Service have ready access to the Retail Credit files (see paragraph 6 of the affidavit of C. James Jessee, Jr., dated June 12, 1968, and page 57 of the Subcommittee testimony excerpts attached to said affidavit as collective Exhibit "E"—Record pp. 36, 46-48).

Each of the above-described republications was the natural and probable consequence of the original publication of said false, libelous and defamatory statements and the defendant was aware that active reference files would be maintained by itself and its customers and that the same would be periodically utilized. Therefore, each republication constitutes a separate libel and a separate invasion of privacy for which Retail Credit Company is liable. *Howe* v. *Bradstreet Company*, 135 Ga. 564, 69 S.E. 1082 (1911); *Riley* v. *Dun & Bradstreet*, 172 F.2d 303 (6th Cir. 1949); and *Weaver* v. *Beneficial Finance Co.*, 199 Va. 196, 98 S.E.2d 687 (1967).

In the case at bar, Retail Credit Company published the libelous and defamatory statements knowing that the reports would be maintained in active reference files by the defendant and its customers and that the natural and probable consequence would be continuous republication of the statements. Therefore, the Court of Appeals and

the District Court erred in denying discovery as to such republication and erred in holding that defendant was not liable for such republications.

III.

The Court of Appeals and the District Court Erred in Completely Overlooking the Fact That, Irrespective of Petitioner's Right to Recover Money Damages, He Is Entitled to Equitable Relief in the Form of a Retraction or Correction of the False Defamatory Credit Reports and an Injunction Against Further Publication and Republication of Said False Reports.

Both the Court of Appeals and the District Court completely overlooked the fact that, irrespective of Petitioner's right to recover money damages, he is entitled to equitable relief in the form of a retraction or correction of the false defamatory reports and an injunction against further publication and republication of said false reports. The Petitioner has repeatedly pointed out, both in the District Court (Record pp. 6-7, 92-93) and at pages 39-42, 46-47 of the Brief for Appellant filed in the Fifth Circuit Court of Appeals, that in addition to and irrespective of his right to money damages, he is entitled to equitable relief in this case.

Even after being advised of the falsity of the statements contained in the defamatory reports, Retail Credit Company has refused to retract or correct same (Record pp. 92, 169). Retail credit has also refused to divulge the names of its customers that have received such false reports (Record pp. 35-36, 169). In his deposition of September 11, 1968, W. Lee Burge, President of Retail Credit Company, admitted that defendant maintains reference files of derogatory information for ten years, which files are reviewed by Retail Credit employees in making new reports (pp. 40, 47 and 84 of the Burge deposition—Record

pp. 254-255, 262-263, 302-303); that its reports are retained in the files of insurance and surety companies, being reviewed by one or more employees (pp. 64-67 of the Burge deposition—Record pp. 280-284); and that the insurance companies and bonding companies sometimes pass this information on to insurance agents and brokers (pp. 56, 87-88 of the Burge deposition—Record pp. 271-272, 305-306). Moreover, many recent newspaper and magazine articles and reports of Congressional hearings have repeatedly pointed out how, in this computer age, erroneous facts once reported are continually republished. See listings of articles and reports contained in the Bibliography of Materials Pertinent to Credit Reports and Invasion of Privacy (Appendix pp. A24-A28).

Surely defendant should not be allowed to perpetuate its heinous act of character assassination. In *Bazemore* v. *Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930), the Supreme Court of Georgia held that the defendants should be enjoined from further publication of photographs of the plaintiff's deceased child. Moreover, such relief was made available in chancery as early as 1395 in *Elnet* v. *Belgrave*, In Chancery before John deScarle, M.R., Lord Keeper.

For many years, Professors Roscoe Pound and Zechariah Chaffee, Jr. were among the leading exponents of the proposition that injunctive relief should be granted in cases involving defamation and invasion of privacy. For collected cases dealing with injunctive relief in cases of defamation and injuries to personality, see: Pound, *Cases on Equitable Relief Against Defamation and Other Injuries by Writing or Speaking* (1915); Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 Harvard Law Review 640 (1916); Chaffee and Pound, *Cases on Equitable Relief Against Torts Including Defamation and Injuries to Personality* (1933); and Chaffee and Re,

Cases and Materials on Equity, pp. 995-1079 (1967). See particularly, *Dixon* v. *Holden*, 7 Eq. 488 (1869); *Vanderbilt* v. *Mitchell*, 72 N.J. Eq. 910, 67 A. 97 (1907) (in which the Court relied upon *Pavesich* v. *New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1904)); and *Webber* v. *Gray*, 228 Ark. 289, 307 S.W.2d 80 (1957).

Petitioner respectfully submits that both the Court of Appeals and the District Court erred in overlooking the fact that plaintiff is entitled to equitable relief. Petitioner shows that he is entitled to equitable relief by way of equitable discovery and an injunction against further libels and invasions of privacy by continued maintenance of active files and computer tapes containing the defamatory statements concerning Petitioner and further publication of same.

To deny Petitioner the relief requested would be to deny him his constitutional rights to the pursuit of happiness. Stated in another way, Petitioner has a constitutional right to be left alone and should not be subject to future harassment based upon false information that is allowed to stand secret and uncorrected.

Should Petitioner have to live out the rest of his days with the gloomy prospect that, at any time, some bank, insurance company or surety company may request information from Retail Credit Company or its customers who have received its reports previously (it being a common practice for insurance and surety companies to trade underwriting information), and will receive from those sources information which includes the false, libelous and defamatory statements contained in their active reference files? Is he to always live with a skeleton in his closet that may be rattled at any moment, even though the skeleton be not of his own making? Should he have to sue Retail Credit Company and all of its customers every year,

just to make sure that there has been no republication that has been concealed from him by a contractual arrangement between Retail Credit Company and its customers or by a secret agreement between cooperating insurance or bond underwriters?

It is clear that each of the foregoing questions must be answered in the negative. Therefore, the District Court should invoke its equity powers to prevent a continuing trespass against the reputation of the Petitioner and require the defendant, Retail Credit Company, to retract and correct such false, libelous and defaming reports and to furnish the Petitioner, as a matter of equitable discovery, copies of any false, libelous and defamatory reports whenever published or republished, and the names and addresses of the companies or persons receiving such reports so that Petitioner may take measures to repair the injury and damage done to his good name, reputation and credit standing, both personal and business.

IV.

The Court of Appeals and the District Court Erred in Denying Discovery and Such Refusal to Permit Discovery Is in Direct Conflict with Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947), and Denies Petitioner His Right to Equal Protection under the Law and Constitutes a Denial of Procedural Due Process under the Constitution of the State of Georgia of 1945 and the Constitution of the United States of America.

The Court of Appeals' affirmance of the denial of discovery is in direct conflict with decisions of that Court and the United States Supreme Court—*viz*, *Southern Railway Company* v. *Lanham*, 403 F.2d 119 (5th Cir. 1968); and *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947). The refusal to permit discovery and the taking of secret "in camera" evidence is the antithesis of the

avowed purpose of liberality in discovery enunciated by the United States Supreme Court in *Hickman* v. *Taylor*, *supra*. Furthermore, denial of discovery under the facts of the present case denies Petitioner his right to equal protection under the law and constitutes a denial of procedural due process, in violation of Article I, Section I, Paragraphs II and III of the Constitution of the State of Georgia of 1945, and in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America. *Doud* v. *United States ex rel. Cook*, 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215 (1951), and *Chessman* v. *Teets*, 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253 (1957).

The full facts as to repeated libels and invasions of Petitioner's right to privacy by the false and libelous reports published by Retail Credit Company, the extent and scope of such libels and invasions of privacy by initial publication and distribution, republication, and the maintenance of active files by Retail Credit Company and its customers, and the identity of all persons receiving the information contained in said reports, are all matters which should be fully explored by discovery. Petitioner sought discovery through Rules 26, 30, 33, 34, 36 and 45 of the *Federal Rules of Civil Procedure*, i.e., by motion for production of documents, interrogatories, requests for admissions, depositions, and subpoenas duces tecum (Record pp. 8-9, 9-17, 18-21, 94-96, 100-121, 137-148). Petitioner also sought relief under Rule 56(f) of the *Federal Rules of Civil Procedure* (Record pp. 80-90).

Retail Credit and its customers objected to every effort to obtain discovery (Record pp. 25-27, 28-31, 122-124, 124-129, 130-132, 149-156), and, to this point, Petitioner has yet to be allowed access to the files of Retail Credit Company and its customers that will reveal the full facts as to the libels and invasions of privacy by the defendant.

Moreover, after being advised of the falsity of its reports, defendant has willfully refused to retract or correct same (Record pp. 92, 169).

The denial of discovery in this case (Record pp. 176-192) is in direct conflict with decisions of the Fifth Circuit Court of Appeals and the Supreme Court of the United States which hold that discovery rules are to be accorded a broad and liberal treatment. See *Southern Railway Company* v. *Lanham*, 403 F.2d 119 (5th Cir. 1968); and *Hickman* v. *Taylor*, 329 U.S. 495, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947). In *Southern Railway Company* v. *Lanham*, *supra*, the Court of Appeals stated at page 130:

> ". . . A lawsuit is not a contest in concealment, and the discovery process was established so that either party may compel the other to disgorge whatever facts he has in his possession. *Hickman* v. *Taylor*, 1947, 329 U.S. 495, 507, 67 S.Ct. 385, 392, 91 L.Ed. 451."

Later, at page 132, the Court further stated:

> ". . . Moreover, the Court made it clear that the 'discovery rules are to be accorded a broad and liberal treatment' and that 'mutual knowledge of all of the relevant facts gathered by both parties is essential to proper litigation.' *Hickman* v. *Taylor*, *supra*, 329 U.S. at 507, 67 S.Ct. at 392."

Petitioner respectfully submits that the Courts below erred in denying discovery to the Petitioner under the *Federal Rules of Civil Procedure*, and erred in refusing to order Retail Credit Company and its customers to respond to the interrogatories, requests for admissions, motion for production of documents, notices of taking depositions, and subpoenas duces tecum.

Attorneys for Retail Credit Company submitted certain reports to the Court *in camera*, which Petitioner has

not been allowed to examine (Record pp. 58-61, 178). Said reports were transmitted to the Court of Appeals in a sealed envelope and for that reason, have not been reproduced in the printed Record. Petitioner has requested the Court of Appeals to forward the *in camera* evidence to this Court.

Petitioner submits that, in addition to the reports themselves, there are many other documents in the possession of the defendant and its customers, i.e., correspondence, memoranda, written notations of telephone conversations, forms, file jackets, etc., which contain material evidence as to publication and republication of said false reports. Moreover, it appears that part of defendant's records are on microfilm and stored in computers (Record pp. 14-15, 32). As to whether all of said documents are before the Court, Petitioner cannot say, but submits that it is a dangerous precedent to allow a defendant to pick what it thinks the Court should see.

The documents sought by discovery are not privileged. *Johnson* v. *The Bradstreet Company*, 77 Ga. 172 (1886); *The Bradstreet Company* v. *Oswald*, 96 Ga. 396, 23 S.E. 423 (1895); and *Western Union Telegraph* v. *Pritchett*, 108 Ga. 411, 34 S.E. 216 (1899). Nor is there any other good reason why plaintiff should have been denied access to said records.

Petitioner submits that the Courts below erred in not making the *in camera* evidence available to him. Said denial deprived him of the right of cross-examination of the defendant and of an opportunity to develop evidence which could be used in opposition to defendant's motion for summary judgment.

In Paragraph 15 and Prayer (f) of his complaint as amended (Record pp. 92-93), Petitioner prayed for discovery in equity of the type that is permissible under a bill of discovery, as a separate ground of equitable relief under

the Court's inherent equity jurisdiction. *Kurtz* v. *Brown*, 152 F. 372 (3rd Cir. 1906); *Brown* v. *McDonald*, 133 F. 897 (3rd Cir. 1905); *Pressed Steel Car Co.* v. *Union Pacific Ry.*, 240 F. 135 (D.C. N.Y. 1917) (Learned Hand, J.); *Coca-Cola Co.* v. *Atlanta*, 152 Ga. 558, 110 S.E. 730 (1921); and *Lucas* v. *Neidlinger*, 210 Ga. 557, 81 S.E.2d 825 (1954). Such relief has existed ever since the early days of English law, when, under a writ of *copia libelli deliberanda*, the chancellor would compel ecclesiastical authorities to divulge secret libels against the petitioner. This writ is referred to in *Black's Law Dictionary*, Fourth Edition, 1957, p. 405, as follows: "COPIA LIBELLI DELIBERANDA. The name of a writ that lay where a man could not get a copy of a libel at the hands of a spiritual judge, to have the same delivered to him. Reg[istrum] Orig[inale] 51."

In his complaint as amended (Record pp. 90-91), Petitioner shows that denial of discovery in this case violates his rights under the Constitution of the United States and the Constitution of the State of Georgia. The denial of discovery under the facts of the present case denies plaintiff his right to equal protection under the law and constitutes a denial of procedural due process, in violation of Article I, Section I, Paragraphs II and III of the Constitution of the State of Georgia of 1945, and in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America. *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215 (1951); and *Chessman* v. *Teets*, 354 U.S. 156, 77 S.Ct. 1127, 1 L.Ed.2d 1253 (1957).

V.

The Court of Appeals and the District Court Erred in Holding That It Was Immaterial As to Where Publication of the Defamatory Reports Occurred and in Refusing to Apply the Lex Loci Delicti on Issues of Substantive Law in Direct Contravention of the Rule Laid Down in Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477.

Petitioner respectfully submits that the Courts below erred in their interpretations of the Georgia law relative to concealment, tolling the statute of limitations, liability for republication, and invasion of privacy. He further submits that the correct statement of Georgia law appears in Parts I and II of the Argument herein, at pp. 11-22, *ante* and that the Courts below erred in not applying such law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

From the record, it appears that, in addition to publications in Georgia, there were also publications in Florida (Record pp. 196-198) and publications in Connecticut (Record p. 129), which would require the application of Florida and Connecticut law. Because of the numerous insurance companies, surety companies, banks, and other institutions with whom the plaintiff deals (Record p. 166), it is also likely that publications have taken place in New York, Massachusetts, and other states unknown to the Petitioner, which would require the application of the law of these states.

At page 2 (Appendix p. A9) of its opinion, the Court of Appeals stated: "Contrary to plaintiff's argument on appeal, the state where the publication of the alleged defamation occurred is immaterial." However, in view of the District Court's comments about the persuasiveness of the decisions from other states with regard to liability for republication

(Appendix pp. A1-A2) and the comments of the Court of Appeals concerning "public" disclosure as being a "close question of state substantive law", it is seen that the application of the *lex loci delicti* is indeed relevant on issues of substantive law. See, *Orr* v. *Sasseman*, 239 F.2d 182 (5th Cir. 1956); *Diplomat Electric, Inc.* v. *Westinghouse Electric Supply Co.*, 378 F.2d 377 (5th Cir. 1967); and *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 85 L.Ed. 1477, 61 S.Ct. 1020.

Petitioner respectfully submits that the Court of Appeals and the District Court both erred in holding that it was immaterial as to where the publication of defamatory reports occurred and in refusing to apply the *lex loci delicti* on issues of substantive law. Such holdings were in direct contravention of the rule laid down in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, *supra*.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

C. JAMES JESSEE, JR.
SHOOB, MCLAIN & JESSEE
3242 First National Bank Tower
Atlanta, Georgia 30303

MARTIN DAVID MERRITT
SHOOB, MCLAIN & JESSEE
3242 First National Bank Tower
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I, Martin David Merritt, Attorney for Petitioner, Cassius L. Peacock, Jr., do hereby certify that I have this day served the required number of copies of the foregoing Petition for a Writ of Certiorari upon Hugh M. Dorsey, Jr., Hansel, Post, Brandon & Dorsey, 3300 First National Bank Tower, Atlanta, Georgia 30303, Attorneys for Respondent, Retail Credit Company, by depositing the same in the United States Mail, first-class postage prepaid.

This 30th day of November, 1970.

.....

MARTIN DAVID MERRITT
Attorney for Petitioner

(1) Opinions, Judgments and Orders of the District Court and the Fifth Circuit Court of Appeals

Opinion of District Court Entered on June 13, 1969 and Reported as 302 F. Supp. 418:

CASSIUS L. PEACOCK, JR.,
vs.
RETAIL CREDIT COMPANY
} Case No. 11597

ORDER

EDENFIELD, District Judge.

This suit for libel, and for invasion of the right of privacy, is presently under a stay order, being continued by this court until the issuance of a further order upon pending discovery matters. The court's stay order stated that it would consider defendant's motion for summary judgment after the discovery ruling. However, the court's view of the law controlling the case enables the court to pass on all motions simultaneously, and it hereby grants defendant's motion for summary judgment and denies any further discovery to plaintiff.

Plaintiff, Cassius L. Peacock, Jr., sued the defendant, Retail Credit Company, a large national mercantile credit information agency, for libel, and for invasion of the right to privacy, alleging that defendant had accused plaintiff of making false financial reports in his capacity as an officer of Peacock Construction Company, and of adultery with prostitutes and three successive bookkeepers in his employ. The alleged publications appeared in credit and insurance reports furnished, in the normal course of defendant's business, to insurance companies, banks and other businesses requesting such information. These allegations

would amount to libel per se, under Ga. Code Ann. § 105-701 (1968). Plaintiff argued that each review or exhibition to a third party, of a report once furnished a customer and placed in its file, was a republication of the original libel. Defendant denied all of plaintiff's contentions and further contended that, even if it had published a libel against plaintiff, more than one year had intervened between the date of publication and the date of suit and that the action was therefore barred by the Georgia statute of limitations, Ga.Code Ann. § 3-1004 (Supp.1968). Defendant's view of the Georgia law of libel was that each republication by others of an original libel created a separate cause of action against such subsequent publisher but did not renew the original publication. Therefore, it contended, republication by its customers, if any, did not renew the original publisher's libel. Plaintiff further contended that defendant's collection and publishing of the alleged libelous statements were violations of his constitutional right to privacy, to which defendant countered that plaintiff's failure to show a physical intrusion, similar to a trespass, or a public disclosure of the libel, was fatal to plaintiff's claim.

Plaintiff requested discovery, by means of a motion to produce, under Fed.R.Civ.P. 34, of all reports or documents concerning him, which had ever been in the files of Retail Credit Company. Defendant objected to production of such documents for any period beyond the one-year period of limitations, alleging that such documents published before that period would be irrelevant to the plaintiff's libel suit because barred by the statute of limitations. To counter this allegation, plaintiff alleged that defendant's concealment of libelous statements amounted to such fraud as would toll the statute of limitations, under Ga.Code Ann. § 3-807 (1962). The court ordered defendant to produce all such documents furnished customers during

the one-year statute of limitations period. Those documents revealed no libel. The court also ordered defendant to furnish for its *in camera* inspection all other documents outside the one-year period. These documents are now in the custody of the court.

Defendant filed its motion for summary judgment. Plaintiff filed a motion, under Fed.R.Civ.P. 56(f), to continue the hearing of defendant's motion for summary judgment, "until such time as plaintiff may have taken depositions or obtained affidavits" essential to the establishment of his case. Plaintiff readily admitted that he had not established a case for libel, but stated, in an affidavit of his attorney, that "plaintiff expects to establish through discovery the continued use and reuse of said libelous statements by the customers of Retail Credit Company, which continued use constituted a republication of the libelous statements for which Retail Credit is responsible."

The plaintiff then attempted to discover relevant information by notices to take depositions, under Fed.R.Civ.P. 30(a), and subpoenas duces tecum, under Fed.R.Civ.P. 45(d), addressed to representatives of various corporations, alleged to be customers of the defendant. Motions to quash the subpoenas duces tecum were filed. The court then stayed the action, pending this order.

At the outset the court could not discern from the pleadings or the affidavits whether plaintiff was asserting a separate claim for invasion of privacy or whether his allegations in this regard were merely intended to show the aggravating character of the alleged libel. The court therefore entered an order stating:

> "The court is somewhat at a loss * * * as to plaintiff's exact contentions with respect to how and when he contends his right to privacy was invaded.

"• • • [T]he plaintiff is instructed • • • to elaborate by affidavit or otherwise, as to how and when he contends his right to privacy was invaded, and on what legal theory. • • •" (See Cabaniss v. Hipsley, 114 Ga App. 367, 151 S.E.2d 496).

In response, the plaintiff filed a second amendment to his complaint, a brief, and affidavits by him and by his attorney in which he asserted, in essence, that the publication of the credit report itself constituted the invasion of his privacy. Defendant, on the other hand, asserts that more was required, to wit, either (1) a physical intrusion of plaintiff's solitude, or (2) a public, rather than a restricted, disclosure of embarrassing private facts about plaintiff. In this posture, the case presently awaits decision.

[1] The libel issue in this case ultimately turns on the Georgia law of libel, that every publication of libelous matter is a separate cause of action, regardless of the time, place or publisher of the original publication.

> "After a libel is published, and subsequently the same libel is again published by an independent party, without participation by the first publisher, the republication is independent and separate from the first publication. It is an independent tort." Howe v. Bradstreet Co., 135 Ga. 564, 565, 69 S.E. 1082 (1911).

See also Central of Georgia Ry. Co. v. Sheftall, 118 Ga. 865, 867, 45 S.E. 687 (1903); Atlanta Journal Co. v. Doyal, 82 Ga.App. 321, 327, 60 S.E.2d 802 (1950); Western Union Tel. Co. v. Vickers, 71 Ga.App. 204, 209, 30 S.E.2d 440 (1944); Crowe v. Constitution Publishing Co., 63 Ga.App. 497, 507, 11 S.E.2d 513 (1940).

[2] In order to establish a contrary rule, plaintiff has cited a dictum in Howe v. Bradstreet Co., supra, 135 Ga. at 565-566, 69 S.E. 1082, to the effect that facts attending a second publication of a libel may be such as to hold the

original publisher liable in an independent action for damages accruing from the publication provided the second publication was the natural consequence of the original publication. In other words, if republication by its customers were the natural consequence of the original publication by Retail Credit, then it would be liable in an independent cause of action, for damages accruing from the republication. But this is not the law, at least in Georgia. The court has been unable to find a single Georgia case in which this dictum has been followed. Moreover, the *Howe* case itself involved facts very similar to the case plaintiff attempts to make here, and the court there held that defendant, the Bradstreet Company, was *not* liable for the republication by its customer.[1] While cases cited by plaintiff, such as Raley v. Dun & Bradstreet, Inc., 172 F.2d 303 (6th Cir., 1949), and Weaver v. Beneficial Financial Co., 199 Va. 196, 98 S.E.2d 687 (1967), would, in the absence of controlling Georgia law, be persuasive to this court, such is not the case here. Therefore, the court holds that Retail Credit is not liable for republication to third parties[2] by its customers of any libelous matter which it originally published.

1. Assuming, arguendo, the plaintiff's view of the *Howe* case, republication by a Retail Credit customer could hardly be considered a natural consequence of the original publication. The standard customer's contract, Exhibit "C" to Retail Credit's motion for summary judgment, states: "All reports, whether oral or written, will be kept strictly confidential: no information from reports nor [Retail Credit's] identity as the reporting agency will be revealed to the person reported on or to any other person except a person whose duty requires him to pass on the transaction in relation to which the report was ordered. *No information will be requested for the use of any other person except with [Retail Credit's] written permission.*" (Emphasis added.)

2. Of course, communication of information to a secretary, or to others within the corporate framework, is not a publication. Central of Georgia Ry. Co. v. Jones, 18 Ga.App. 414, 89 S.E. 429 (1916); King v. Schaeffer, 115 Ga.App. 344, 346-347, 154 S.E.2d 819 (1967).

[3, 4] The question remains, however, whether there was concealment of the publication of libelous matter, tantamount to fraud, under Ga.Code Ann. §3-807 (1962). Of course, "mere ignorance of the existence of the facts constituting a cause of action does not prevent the running of the statute of limitations." Davis v. Boyett, 120 Ga. 649, 651, 48 S.E. 185, 186, 66 L.R.A. 258 (1904). There is also no evidence in the case of "deceit or false representation, or other conduct involving moral turpitude." Carnes v. Bank of Jonesboro, 58 Ga.App. 193, 196, 198 S.E. 338, 340 (1938). In short, there is no actionable fraud. See Clinton v. State Farm Mutual Auto Ins. Co., 110 Ga. App. 417, 421-424, 138 S.E.2d 687 (1964); Saffold v. Scarborough, 91 Ga.App. 628, 86 S.E.2d 649 (1955). Therefore, the court holds that the allegations of fraud are insufficient to toll the statute of limitations.

[5] With regard to plaintiff's allegation that his right to privacy has been violated, the court notes that Georgia has long recognized such a cause of action. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101 (1905).

With this realization, the court turns to the case of Cabaniss v. Hipsley, 114 Ga.App. 367, 151 S.E.2d 496 (1966), in which Judge Eberhardt has analyzed the Georgia cases in this area and has categorized them into the following four parts: (1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs, (2) public disclosure of embarrassing private facts about the plaintiff, (3) publicity which places the plaintiff in a false light in the public eye, (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

In plaintiff's response to the court's request for him to "elaborate • • • as to how and when he contends his

right to privacy was invaded, and on what legal theory" plaintiff responded:

> "The false and libelous reports published and distributed * * * have invaded plaintiff's right to privacy by placing him in a false light in the public eye. * * *
>
> * * *
>
> "* * *[T]he inclusion of such derogatory information as a 'credit report' constitutes invasion of plaintiff's right to privacy as (1) an unwarranted intrusion into plaintiff's private affairs; and (2) unwarranted public disclosure of embarrassing private facts about the plaintiff."

The court realizes that the case is before the court on motion for summary judgment, not a motion to dismiss, and that, therefore, the sufficiency of these pleadings as such would not ordinarily come into question. The court concludes, however, that, irrespective of this, the amendment and the affidavits filed by the plaintiff in response to the court's order, when tested against the requirements of *Cabaniss*, supra, now show, affirmatively, that the plaintiff cannot recover on the theory of an invasion of privacy and that the motion whether considered as one to dismiss or for summary judgment, must be granted. In demontrating the correctness of this conclusion the court will now examine each actionable category as recognized by *Cabaniss*, just as did Judge Eberhardt.

[6] First, plaintiff's reliance on theory (1) as recognized by *Cabaniss*, that of intrusion into his private affairs, is misplaced, because the Georgia cases require that the intrusion must be physical, analogous to a trespass. For example, in Ford Motor Co. v. Williams, 108 Ga.App. 21, 132 S.E.2d 206, rev'd on other grounds, 219 Ga. 505, 134 S.E.2d 32 (1963), defendant broke into plaintiff's house and removed goods which he wrongfully suspected

plaintiff of having stolen. In Marcelli v. Teasley, 72 Ga. App. 421, 33 S.E.2d 836 (1945), the owner of property came upon premises occupied by the plaintiff and threatened eviction in a loud, profane manner in the presence of others. Walker v. Whittle, 83 Ga.App. 445, 64 S.E.2d 87 (1951), involved a mistaken identity in the making of an arrest in the home without a warrant. In McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga.App. 92, 2 S.E.2d 810 (1939), electronic eavesdropping equipment was placed in plaintiff's hospital room to obtain information to destroy the validity of her claim of injury, due to an allegedly defective bottle. Finally, several cases involved an unauthorized entry into plaintiff's quarters: Young v. Western & Atlantic R. R., 39 Ga.App. 761, 148 S.E. 414 (1929) (home); Byfield v. Candler, 33 Ga.App. 275, 125 S.E. 905 (1924) (ship's stateroom); Newcomb Hotel Co. v. Corbett, 27 Ga.App. 365, 108 S.E. 309 (1921) (hotel room). See also B-W Acceptance Corp. v. Callaway, 224 Ga. 367, 162 S.E.2d 430 (1968) (repeated attempts, including visits, by defendant collection agency to collect a husband's debt from his estranged wife established a cause of action). Plaintiff has neither alleged nor shown to the court in any way that he has suffered such a physical intrusion upon his privacy. Morever, in response to the court's query, he replied that the "inclusion of derogatory information as a 'credit report'" constituted the violation. Manifestly, this response not only fails to establish such a physical invasion, analogous to a trespass, as would be required under category (1), but in fact shows the contrary.

Plaintiff's attempt to recover under category (2), on the theory that the credit report amounted to a public disclosure of embarrassing private facts about him, must likewise fail, for the simple reason that there has been no "public" disclosure of any information concerning plaintiff.

Only clients of Retail Credit have been supplied with this information, and while this limited publication may have resulted in the denial of an insurance policy, or a denial of credit, the court holds that this is not the type of public disclosure required to establish an invasion of privacy under category (2).[3]

[7] The cases support this conclusion. Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956), and Bazemore v. Savannah Hosp., 171 Ga. 257, 155 S.E. 194 (1930), both involved the unauthorized publication for profit of a photograph of a deceased person. In the earlier case (*Bazemore*), the court held that newspaper publication of an abnormally developed deceased child was actionable as a violation of the right to privacy. But in *Fleetwood*, the court rejected similar allegations concerning a brutally murdered child, noting cryptically that *Bazemore* "was not a unanimous decision." 212 Ga. at 168, 91 S.E.2d 344. A number of cases have held the right to privacy inapplicable. See, for example, Gouldman-Taber Pontiac, Inc. v. Zerbst, 213 Ga. 682, 100 S.E.2d 881 (1957), and Haggard v. Shaw, 100 Ga. App. 813, 112 S.E.2d 286 (1959), in which plaintiff's creditor had written to plaintiff's employer seeking assistance in the collection of an unpaid account. See also Davis v. General Finance & Thrift Corp., 80 Ga.App. 708, 57 S.E.2d 225 (1950), where defendant sent plaintiff a telegram dunning him for an unpaid account. None of these

3. The court draws support for its conclusion from the "strictly confidential" nature of the Retail Credit standard customer's contract, described in note 1, *supra*.

Further, Black's Law Dictionary 1393 (4th ed. 1968), defines "public", in pertinent part: "Pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; general; open to common use. [Omitting citations.] Belonging to the people at large; relating to or affecting the whole people of a state, nation, or community; not limited or restricted to any particular class of the community. [Omitting citations.]"

cases support the theory that the mere submission of a confidential credit report, even when it contains false and libelous information, by a credti information company to its customers, is a "public disclosure of embarrassing private facts."

[8] Finally, the question remains whether a false and libelous credit report can be held to invade plaintiff's right to privacy by placing him in a "false light in the public eye." The court holds that, unless it is disseminated to the public, it cannot.

It is conceded that, under category (3), unlike the two categories considered above, the mere submission of the false and libelous information would be actionable, provided it were then disseminated to the public. But, for the reasons stated above, the "public" was not involved here.[4] In his original complaint, plaintiff asserted that publication was being made to "customers of Retail Credit Company." In his first amendment, he alleged that these customers republished the reports to "persons doing business" with them, but that the reports were still not available to him. If the reports were not available to plaintiff, the court is at a loss to understand how they could be conceived to be available to the public.

Again the cases support this conclusion. In Goodyear Tire & Rubber Co. v. Vandergriff, 52 Ga.App. 662, 184 S.E. 452 (1936), the plaintiff trucker stated a cause of action against defendant by alleging that defendant's agent had impersonated plaintiff in obtaining confidential sales information, and then told its competitors that plaintiff had furnished it with the information. Pinkerton Nat'l. Detective Agency v. Stevens, 108 Ga.App. 159, 132 S.E.2d 119 (1963), involved the overt and prolonged trailing of plain-

4. *See* note 3, *supra*.

tiff by a detective agency in such a manner as to excite distrust and suspicion of neighbors. In Meeks v. Douglas, 108 Ga.App. 424, 133 S.E.2d 768 (1963), allegations of a sheriff's search warrant, taken out in bad faith, injuring plaintiff's reputation, were actionable. *See also* Ford Motor Co. v. Williams, supra. But, in Brown v. Colonial Stores, Inc., 110 Ga.App. 154, 138 S.E.2d 62 (1964), the plaintiff failed to state a cause of action where she alleged questioning, at the check-out counter of defendant, about a bad check written by her son. In each of these cases, the actionable events occurred in the public arena. On the other hand, the credit report here alleged to be actionable, has not been exposed to the public.

For the above reasons, the court concludes that the right of privacy is not involved in this case, and holds that the plaintiff has failed to state a claim on this theory.

[9] It is readily evident from the discovery which has been allowed in the case, that Retail Credit has published no libel concerning the plaintiff within the one-year period of limitation. Further, no fraud has been shown sufficient to toll the statute of limitations. And, under the controlling Georgia law, Retail Credit cannot be held liable for a second publication by one of its customers of any libel which it originally published. As to the alleged violation of the right of privacy, the plaintiff has failed to establish any theory on which he could recover and his pleadings and affidavits in fact show the contrary. Therefore, the defendant's motion for summary judgment is hereby granted, with costs to the plaintiff.

The conclusions which the court has reached dictate that any further discovery, either beyond the period of the statute of limitations, or from third parties, would be irrelevant, immaterial and to no avail under the issues before the court. Therefore, the court denies plaintiff any

opportunity for further discovery, and the various motions to quash subpoenas duces tecum filed by defendant Retail Credit, and other witnesses and the corporations by which they are employed are sustained.[5]

To summarize: Defendant's motion for summary judgment is granted; plaintiff's motions for further discovery are denied; and the motions to quash subpoenas duces tecum, filed by defendant and others, are sustained.

---

5. In making this decision the court expresses no opinion whether plaintiff may or may not have some right of action against customers of defendant who may have republished the alleged libel within the statute of limitations. Nor does the court express any opinion as to whether plaintiff might maintain a separate action to discover who these customers are, and hence who to sue. *See, e. g.*, Kurtz v. Brown, 152 F. 372 (3d Cir. 1906).

Opinion and Judgment of Court of Appeals Entered on July 2, 1970

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28646

CASSIUS L. PEACOCK, JR.,
Plaintiff-Appellant,

versus

RETAIL CREDIT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(July 2, 1970)

Before TUTTLE, DYER and CLARK,
Circuit Judges.

PER CURIAM: This is a diversity action for libel and invasion of privacy against Retail Credit Company for allegedly publishing false and defamatory statements in credit reports furnished to insurance companies and banks. The District Court entered summary judgment for defendant Retail Credit Company, holding that the Georgia one year statute of limitations, Ga. Code § 3-1004, barred the libel action and that no claim was shown for invasion of privacy because plaintiff failed to show

any physical trespass or "public" disclosure of private facts. We affirm.

The District Judge thoroughly analyzed and answered all the contentions raised by plaintiff and we affirm on the basis of his opinion.[1] We would only add the following:

Contrary to plaintiff's argument on appeal, the state where the publication of the alleged defamation occurred is immaterial. Since Georgia is the forum state Georgia law governs with respect to the statute of limitations. *Baron Tube Company v. Transport Insurance Company*, 5 Cir. 1966, 365 F.2d 858, 860 and cases there cited.

In holding that there was no "public" disclosure the District Judge decided a close question of state substantive law on which there was no authority squarely on point. Unlike *Petersen v. Klos*, 5 Cir. 1970, ... F.2d ..... [No. 27427, March 19, 1970] the District Judge in this case carefully explained his reasoning. His judgment of where the dimly lit *Erie* path leads is as good as ours would be. We therefore give great weight to the determination of state law by the Trial Judge sitting in the state and familiar with local law and its trends. *Leavell & Co. v. Bd. of Comm., Port of N.O.* 3, 5 Cir. 1970, ... F.2d ....., [28437, May 6, 1970] *See, e.g., Delduca v. United States Fidelity & Guaranty Company*, 5 Cir. 1966, 357 F.2d 204, n. 1, *reh. denied*, 362 F.2d 1012, and cases cited.

There was no abuse of discretion in denying further discovery.

AFFIRMED.

---

1. The District Court opinion is published at 302 F. Supp. 418 (N.D. Ga., 1969).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28686

D.C. Docket No. Civ. A-11597
CASSIUS L. PEACOCK, JR.,
Plaintiff-Appellant,

versus

RETAIL CREDIT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before TUTTLE, DYER and CLARK, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

"Per Curiam"

Order of August 3, 1970 Denying Petition for Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25846

CASSIUS L. PEACOCK, JR.,
Plaintiff-Appellant,

versus

RETAIL CREDIT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(August 3, 1970)

On Petition for Rehearing

Before Tuttle, Dyer & Clark, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Order of November 3, 1970, Denying Appellant's Extraordinary Motion for Rehearing:

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 25648

CASSIUS L. PEACOCK, JR.,
Plaintiff-Appellant,

versus

RETAIL CREDIT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

Before TUTTLE, DYER and CLARK, Circuit Judges.

BY THE COURT

IT IS ORDERED THAT appellant's extraordinary motion for rehearing out of time filed in the above styled and numbered cause is hereby **DENIED**.

(2) Order of October 29, 1970, Enlarging Time to File Petition for Writ of Certiorari:

SUPREME COURT OF THE UNITED STATES

No. , OCTOBER TERM, 1970

CASSIUS L. PEACOCK,

Petitioner,

vs.

RETAIL CREDIT COMPANY

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 2nd, 1970.

Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 29th day of October, 1970.

(3) Constitutional Provisions:

"ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Fourth Amendment, United States Constitution.

"ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." Fifth Amendment, United States Constitution.

"Paragraph II. Protection the duty of government.—Protection to person and property is the paramount duty of government, and shall be impartial and complete." Constitution of the State of Georgia of 1945, Article I, Section I, Paragraph II.

"Paragraph III. Life, liberty, and property.—No person shall be deprived of life, liberty, or property, except by due process of law." Constitution of the State of Georgia of 1945, Article I, Section I, Paragraph II.

(4) Federal Statutes:

"28 U.S.C.A. §1254. *Courts of appeals; certiorari; appeal; certified questions.* Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

"28 U.S.C.A. §1332. *Diversity of citizenship; amount in controversy; costs:*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in contro-

versy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States; . . . "

(5) Federal Rules of Civil Procedure:

"Rule 26. *Depositions Pending Action*

(a) *When Depositions May be Taken.* Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. . . ."

(b) *Scope of Examination.* Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. . . . ."

"Rule 30. *Depositions Upon Oral Examination*

(a) *Notice of Examination: Time and Place.* A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice

shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time. . . ."

"Rule 33. *Interrogatories to Parties*

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. . . ."

• • •

"Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. . . ."

"Rule 34. *Discovery and Production of Documents and Things for Inspection, Copying, or Photographing*

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspect-

ing, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b).

"Rule 36. *Admission of Facts and of Genuineness of Documents*

(a) *Request for Admission.* After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request.

"Rule 45. *Subpoena*

(a) *For Attendance of Witnesses; Form; Issuance.* Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) *For Production of Documentary Evidence.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

• • •

(d) Subpoena for Taking Depositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45. "

"Rule 52. Findings by the Court

• • •

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. "

"Rule 56. Summary Judgment

• • •

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the

motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

"Rule 59. *New Trials; Amendment of Judgments*

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. . . ."

• • •

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

(6) Bibliography of Materials Pertinent to Credit Reports and Invasion of Privacy:

[1] CONGRESSIONAL REPORTS AND RECORDS OF HEARINGS

1. "Commercial Credit Bureaus", Record of Hearings before the Special Subcommittee on Invasion of Privacy, Committee of Government Operations, United States House of Representatives, 90th Congress, 2nd Session, held May 12, 13, and 14, 1968.

2. "The Computer and Invasion of Privacy", Record of Hearings before the Special Subcommittee on Invasion of Privacy, Committee on Government Operations, United States House of Representatives, 89th Congress, 2nd Session, held July 26, 27, and 28, 1966.

3. "Fair Credit Reporting", Record of Hearings before the Sub-Committee on Financial Institutions, Committee on Banking and Currency, United States Senate, 91st Congress, 1st Session, held May 19, 20, 21, 22, and 23, 1969.

4. "Fair Credit Reporting", Report by the Committee on Banking and Currency, United States Senate, 91st Congress, 1st Session, Senate Report No. 91-517, November 5, 1969.

5. "Privacy and the National Data Bank Concept", Report by the Special Subcommittee on Invasion of Privacy, Committee on Government Operations, United States House of Representatives, 90th Congress, 2nd Session, House Report No. 1842, dated August 2, 1968.

6. "Retail Credit Co. of Atlanta, Ga.", Record of Hearing before Special Subcommittee on Invasion of Privacy, Committee on Government Relations, United States House of Representatives, 90th Congress, 2nd Session, held May 16, 1968.

7. "Special Inquiry on Invasion of Privacy", Record of Hearings before Special Subcommittee on Invasion of Privacy, 89th Congress, 1st Session, held June 2, 3, 4, 7, 23 and September 23, 1965.

[2] LAW REVIEW ARTICLES

1. "Credit Investigations and the Right to Privacy: Quest for a Remedy", 57 Georgetown Law Review 509, February 1969.

2. "The Griswold Case and the Expanding Right to Privacy", 1966 Wisconsin Law Review 979.

[3] BOOKS

1. "Privacy and Freedom", Alan Westin (1967).

2. "The Naked Society", Vance Packard (1964).

[4] MAGAZINE ARTICLES

1. "1984 Minus Sixteen and Counting", *Saturday Review*, April 13, 1968, page 77.

2. "All They Need to Know and More", (a review of *Privacy and Freedom* by Alan F. Westin), *Saturday Review*, September 16, 1967, page 42.

3. "Big Brother Keeps Tabs on Insurance Buyers", by Stanford N. Sesser, *New Republic*, April 27, 1968.

4. "Credit Bureaus Near a Day of Judgment", *Business Week*, August 17, 1968, page 44.

5. "The Computer Data Bank: Will It Kill Your Freedom", by Jack Star, *Look*, June 25, 1968, page 27.

6. "The Day the Computer Got Walton Ashenfelter", by Bob Elliott and Ray Goulding, *The Atlantic Monthly*, November 1967, page 58.

7. "The Death of Privacy", by Ramsey Clark, *McCall's*, February, 1970, page 67.

8. "The National Data Center and Personal Privacy", by Arthur R. Miller, *The Atlantic Monthly*, November 1967, page 53.

9. "Privacy—The Horror Side of Credit", *Time*, December 20, 1968, page 79.

10. "Problems With Credit Investigations", by John Thomas, *The American Legion Magazine*, December 1969, page 6.

11. "The Right to Privacy", *National Review*, June 27, 1967, page 728.

12. "The Snooping Machine", by Alan Westin, *Playboy*, May 1968.

13. "What the Credit Bureaus Know About You", by Joe Alex Morris, *Reader's Digest*, November 1967 page 85.

[5] NEWSPAPER ARTICLES

1. "110 Banks Will Supply Information to NY Unit Opened by Credit Data", *American Banker*, September 13, 1967.

2. "Credit Bureau Controls Nearing Showdown In Congress, With House Bill Much Tougher", *The Wall Street Journal*, April 28, 1970.

3. "Epitaph For Privacy? No. 1" — 'Business Report' —A Fitey Dragon", by Laurence Gwin, *The Atlanta Journal and Constitution*, February 23, 1969, page 1-A.

4. "Epitaph For Privacy? No. 2 — You're Probably On File" by Laurence Gwin, *The Atlanta Journal*, February 24, 1969, page 1-A.

5. "Epitaph For Privacy? No. 3 — Errors Can Damage You", by Laurence Gwin, *The Atlanta Journal*, February 25, 1969, page 1-A.

6. "Epitaph For Privacy? No. 4 — Data Probe Pushes Deep", by Laurence Gwin, *The Atlanta Journal*, February 26, 1969, page 1-A.

7. "Epitaph For Privacy? No. 5 — Credit Raters in Dilemma", by Laurence Gwin, *The Atlanta Journal*, February 27, 1969, page 1-A.

8. "Insurers Pry Into Privacy, Proxmire Says", *The Atlanta Constitution*, May 23, 1969, p. 22.

9. "Insurance 'Snoopers' Assailed", *The Atlanta Constitution*, April 24, 1968.

10. "Prying For Pay — How Credit Bureaus Collect And Use Data On Millions Of Persons", *The Wall Street Journal*, February 5, 1968, page 1.

11. "Retail Credit Might Life Veil", by Art Pine, *The Atlanta Constitution*, May 17, 1968.

12. "The Sound Of Silence — Like To Rebut Credit Data? No Sale, It's Big Secret!" by Laurence Gwin, *The Atlanta Journal and Constitution*, January 26, 1969.

[6] SPEECHES

1. "The Computer — Individual Privacy", speech by U. S. Senator Sam J. Ervin, Jr., March 6, 1967, reported *Vital Speeches*, Vol. 33, No. 14, May 1, 1967, page 421, *et seq.*

2. "The Computerized Man — The Cause of Privacy", speech by Justice William O. Douglas, U. S. Supreme Court, May 20, 1967, reported *Vital Speeches*, Vol. 33, No. 22, September 1, 1967, page 700.

3. "Technology and Society: A Conflict of Interest?", speech by Congressman Cornelius E. Gallagher, March 26, 1969, reported *Congressional Record*, Vol. 115, No. 55, April 1, 1969.